

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:BOS:TL-N-3410-01
MJGormley

date:

to: Woody K. Howell, Territory Manager
LMSB (FSH)

from: Associate Area Counsel, (LMSB)
Area 1

subject: [REDACTED]
UIL# 6511.03-02

This memorandum responds to your request for advice dated May 21, 2001, regarding the validity of a claim for refund under a fact pattern involving NOL carrybacks, a Form 872 extension agreement, and a Form 870-AD Closing Agreement. This memorandum should not be cited as precedent.

ISSUES

Whether taxpayer's claim for refund, based on net operating loss carrybacks from tax year [REDACTED] to tax years [REDACTED] and [REDACTED], is barred by the statute of limitations.

Alternatively, whether taxpayer's claim for refund described above, can be amended to include the carryback of net operating losses from [REDACTED] to tax years [REDACTED] and [REDACTED].

CONCLUSION

The taxpayer's claim for refund, based on net operating loss carrybacks from tax year [REDACTED] to tax years [REDACTED] and [REDACTED], was erroneously allowed after the expiration of the statute of limitations. Additional claims for refund now being made by the taxpayer based on NOL carrybacks from [REDACTED] must be independently considered and cannot be tacked on the previously allowed claim for [REDACTED]. The taxpayer's spreadsheets do not constitute an informal refund claim for [REDACTED].

FACTS

The facts set forth below, and upon which this advice is based, are as stated by your office, in your memorandum dated May 21, 2001, and further supplemented in a telephone conversation on June 11, 2001. If our understanding of the facts is not correct, or if the facts have changed in any way, you should not rely on this advice but rather seek modified advice based on the changed circumstances.

The taxpayer filed amended returns, Forms 1120X, for the years [REDACTED] and [REDACTED], seeking to carryback net operating losses incurred in [REDACTED]. Claims for refund were filed on [REDACTED]. The statute of limitations on assessment for the [REDACTED] year expired on [REDACTED]. The [REDACTED] and [REDACTED] years remained open until [REDACTED], under a Form 872 agreement to extend the period of assessment executed on [REDACTED]. In [REDACTED], the taxpayer was examined for the short year [REDACTED], and the years [REDACTED], [REDACTED] and [REDACTED]. Certain adjustments were proposed regarding the deduction of an expense that the taxpayer claimed was an ordinary and necessary business expense currently deductible under § 162 and which the examiner treated as a capital expenditure. The case was considered by Appeals and was eventually settled, with a portion of the expenses being treated as currently deductible. Neither Exam nor Appeals considered any substantive issues relating to either [REDACTED] or [REDACTED].

Documents in the Appeals files, including the Audit Statement and supporting computations, show that in recomputing the taxpayer's liability, these additional expenses were allowed and taxable income was computed. Thereafter, a net operating loss in the amount of \$[REDACTED] was carried back from [REDACTED] to [REDACTED], a net operating loss in the amount of \$[REDACTED] was carried back from [REDACTED] to [REDACTED], and a net operating loss in the amount of \$[REDACTED] was carried back from [REDACTED] to [REDACTED]. Taxpayer's taxable income for the years [REDACTED], [REDACTED] and [REDACTED] after allowance of the carrybacks was [REDACTED]. As a result, the [REDACTED] carryback losses were allowed in full. As part of the settlement, the taxpayer, on [REDACTED], executed a Form 870-AD Closing Agreement for the short year ending [REDACTED], the year [REDACTED] and the year [REDACTED]. The Closing Agreement was accepted on behalf of the Commissioner on [REDACTED]. Thereafter, it was noted that the Closing Agreement erroneously omitted any reference to the [REDACTED] year. Appeals then prepared a revised Form 870-AD, including the [REDACTED] year. The taxpayer, however, refused to sign the revised 870-AD.

The taxpayer is now seeking to carryback losses from the tax

year [REDACTED] to the [REDACTED] and [REDACTED] tax years. In your request for advice you ask whether the taxpayer's original claim for refund based on the carryback of net operating losses from [REDACTED] to [REDACTED] and [REDACTED] is timely. Although you have determined that the [REDACTED] net operating losses were allowed in full as part of the Appeals settlement, you question whether the taxpayer may now file a "supplemental claim" to carryback the [REDACTED] NOLs based on the [REDACTED] claim for refund. If the statute of limitations is found to be open, you have raised the issue of whether the taxpayer may amend their [REDACTED] claim for refund to include the [REDACTED] tax year.

On June 11, 2001, additional information related to your written request for advice was supplied by Team Manager Jack Greenwood. With regard to the years at issue, Mr. Greenwood verified that the net operating loss generated in [REDACTED] is no longer in issue. It was completely absorbed via the carryback of the [REDACTED] loss to the [REDACTED], [REDACTED] and [REDACTED] tax years. It is now claimed that the taxpayer has subsequently discovered that the income in tax years [REDACTED] and [REDACTED] was not completely offset by the [REDACTED] carryback loss. The taxpayer has since requested that the remaining [REDACTED] and [REDACTED] income be offset by the carryback of a NOL from [REDACTED]. As noted, the Appeals Audit Statement shows that after allowance of the NOL carrybacks to [REDACTED], [REDACTED] and [REDACTED], the taxable income in all years was [REDACTED]. There was no income that could be offset by this [REDACTED] NOL. However, an examination of the Appeals Audit Statement does show that the taxpayer was liable for an alternative minimum tax and an environmental tax for each of the years at issue. We have no detailed information on how the taxpayer proposes to apply the NOL in [REDACTED] and [REDACTED] if the claim is allowed.¹ The statute of limitations for [REDACTED] has since expired and no formal claim for refund has been filed. The taxpayer, however, claims it filed an "informal claim for refund" prior to the expiration of the statute.

Specifically, during the examination of the [REDACTED] through [REDACTED] years, the taxpayer filed numerous workpapers and other documentation with the case agent. As part of the workpapers, the taxpayer submitted spreadsheets covering a [REDACTED] year period. One of these spreadsheets contained information regarding the [REDACTED] tax year. The taxpayer now claims that this particular spreadsheet contained sufficient information for the Commissioner to be put on notice that there was the potential for a carryback loss from [REDACTED] to [REDACTED] and [REDACTED]. The spreadsheet was not marked

¹ While a carryback may be utilized to offset alternative minimum tax, the type of carryback, an ATNOL, is different from an NOL and must be separately calculated.

or otherwise identified as a claim for refund. It was only after the expiration of the statute of limitations for [REDACTED] that the taxpayer discovered the [REDACTED] carryback losses were fully absorbed in [REDACTED], [REDACTED] and [REDACTED] and that there was still income remaining in those years that could be offset by other losses. It was at this point that the taxpayer verbally notified the agent that a claim for refund was being made for [REDACTED] and [REDACTED] based on the carryback of losses from [REDACTED]. To date, no formal claim for refund has been filed.

Legal Analysis

The Service generally is required to refund any overpayment of tax to the person who made such overpayment. I.R.C. § 6402(a). However, pursuant to I.R.C. § 6511(b)(1), no refund can be made after the period of limitations for filing a claim for credit or refund has expired unless the taxpayer timely filed a claim for credit or refund. Under I.R.C. § 6511(b)(1), the taxpayer generally has 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later, to file his claim for refund. However, if an agreement is made under I.R.C. § 6501(c)(4) extending the period for assessment of tax, the period for filing a claim for refund under the 3-year rule does not expire prior to 6 months after the expiration of such period. I.R.C. § 6511(c)(1).

The period for filing a claim for refund with respect to net operating loss carrybacks and certain credit carrybacks, including investment tax credit carrybacks, expires 3 years after the time prescribed by law, including any extensions, for filing the return for the year in which the carryback arose. I.R.C. § 6511(d)(2) and (4). Here, the year of the net operating loss for the purpose of filing a refund claim is the year in which the loss is incurred, not the year in which the loss is used to reduce taxes. Glenwood Cooperative, Inc. v. U.S., 73 F.3d 334 (Fed. Cir. 1996). See also Marshalltown Savings & Loan Ass'n v. U.S., 92-1 USTC ¶ 50,100 (S.D. Iowa 1991) (The taxpayer filed 1040X for 1980 based on the carryback of NOLs from 1985 to 1978, and a resultant carryforward of ITCs from 1979 to 1980. Although the general refund period had expired for 1980, the claim for refund was timely under I.R.C. § 6511(d)(2) because the 1985 year was still open). Moreover, for purposes of I.R.C. § 6511, a credit of an overpayment of tax with respect to another tax liability is deemed a payment of tax with respect to the outstanding tax liability as of the date that the credit is allowed. See Republic Petroleum Corp. v. United States, 613 F.2d 518 n.19 (5th Cir. 1980); S. Rep. No. 685, 81st Cong., 1st Sess. 4-5 (1949). See also 10 Mertens, Law of Federal Income Taxation, ch. 58, secs. 58.28 and 58.43; Saltzman, IRS Practice and

Procedure, ch. 11, par. 11.05[1][b], p. 11-31.

Based on the above, the taxpayer's original claims for refund, carrying back net operating losses from [REDACTED], should not have been allowed. The limited facts available to us regarding the [REDACTED] tax year indicate the claim for refund was filed approximately 9 months after the statute had already expired. It appears the claims were erroneously allowed based on the [REDACTED] and [REDACTED] carryback years' statutes still remaining open under an extension agreement. In addition, even if the [REDACTED] claim were timely filed, it could not now be amended to include the [REDACTED] year. A claim for refund can not be amended once the period for filing a claim for refund has expired. Angelus Milling Co. v. Commissioner, 325 U.S. 293 (1945). The rationale for this rule is that the Service must have timely notice of a claimed error to make an intelligent review of the claim. See Scovill Manufacturing Co. v. Fitzpatrick, 215 F.2d 567 (2d Cir. 1954). Thus, "where the facts upon which the amendment is based would necessarily have been ascertained by the [C]ommissioner in determining the merits of the original claim, the amendment is proper." Pink v. United States, 105 F.2d 183 (2d Cir. 1939). See also St. Joseph Lead Co. V. United States, 299 F.2d 348 (2d Cir. 1962). Accordingly, an amendment that does not raise new grounds for recovery, but is limited to perfecting the amount to be recovered is permissible. United States v. Gates, 14 AFTR 2d 6023 (D. Co. 1964). Here, however, the taxpayer is seeking to carryback net operating losses from an entirely different year. This is clearly not a matter of perfecting the amount to be recovered but, rather, a new claim raising new grounds for recovery, and, as such, not permissible.

As previously noted, the period for filing a claim for refund with respect to NOL carrybacks expires 3 years after the time prescribed by law, including any extensions, for filing the return for the year in which the carryback arose. I.R.C. § 6511(d)(2) and (4). Here, based on the facts provided, the carrybacks arose in [REDACTED]. Therefore, a determination must be made as to whether the period of limitations is still open in the source year, [REDACTED], the year in which the carryback arose. You have stated that the [REDACTED] year has expired. However, the taxpayer is relying on the alleged timely filing of an "informal claim": a spreadsheet for [REDACTED] showing the potential for carryback losses to [REDACTED] and [REDACTED].

Under Treas. Reg. §301.6402-3(a), an administrative claim for refund must be made on the appropriate tax return, amended return, or Form 843. However, a taxpayer may also file an "informal claim" for refund. There are no rigid guidelines except that an informal claim must have " a written component and

should 'adequately apprise the Internal Revenue Service that a refund is sought for certain years.'" Mills v. U.S., 890 F.2d 1133 (11th Cir. 1989), citing Arch Engineering Co., Inc. v. US, 783 F.2d 190, 192 (Fed. Cir. 1986). "A notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by an amendment filed after the lapse of the statutory period." U.S. v. Kales, 314 US 186, 194 (1941). In the instant case, the spreadsheets filed by the taxpayer, while arguably a "writing", did not seek a refund. It was not until after the statute of limitations for the [REDACTED] year had expired that the taxpayer verbally sought a refund based on the NOL carryback. In addition, the formal defects and lack of specificity surrounding the spreadsheets, the informal claim, have not been remedied.

Conclusion

Based on all of the above, the taxpayer's claim for refund, based on net operating loss carrybacks from tax year [REDACTED] to tax years [REDACTED] and [REDACTED], was erroneously allowed after the expiration of the statute of limitations. In any event, any additional claim for refund now being made by the taxpayer based on NOL carrybacks from [REDACTED] must be independently considered and cannot be tacked on the previously allowed claim for [REDACTED]. Accordingly, the [REDACTED] "informal claim" for refund should be denied on several grounds: the time period for filing a timely claim for refund based on NOL carrybacks from [REDACTED], the source year has expired, the documents filed by the taxpayer do not meet the requirements of the Kales informal claim doctrine, and, even if treated as an informal claim, the claim has not been perfected.

If you need further assistance, please contact the undersigned at 617/565-7858.

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